QUESTIONS AND ANSWERS

February 6, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
The United States Senate
Washington D.C.

Dear Mr. Chairman:

I hereby submit my responses to written questions posed by Senators Leahy, Kennedy, Biden, Feingold, Edwards and Grassley.

Sincerely,

S/DC

Deborah Cook

Copy: The Honorable Patrick J. Leahy

RESPONSES OF DEBORAH COOK TO FOLLOW UP QUESTIONS FROM SENATOR PATRICK LEAHY

1. **As we discussed at your hearing, I would like to know how many of your cases from the appellate court were accepted by the Ohio Supreme Court for review.**

   Although I have tried using Ohio Supreme Court resources to determine the answer to your question, Senator, the technology to allow a search of this sort did not exist when I served on the appellate court. Unfortunately, I find that I am unable to say just how many were accepted.

2. **In answer to a question at your hearing about the large number of times you have written in dissent from the majority of the Ohio Supreme Court, you explained that you are often, "somehow designated to write the dissent for other members of the court." Why do you think you have been assigned such a high number of dissents to write? You also mentioned that the high number of dissents had something to do with the fact that members of your court live in, "various parts of the state." How does that affect your proclivity to dissent from the majority of your Court?**

   My colleagues operate on a daily basis from distant offices. Thus we do not have ready access to each other for conferring about our differences of opinion, and dissents are our method of starting a discussion. Dissents can and do convince justices to change their vote.

   I write more than others because I strive to keep the work moving. The court does not assign dissents. Because my work is usually up-to-date, I find that I circulate my dissents in advance of others. My dissenting opinions are often joined by other justices who had not yet begun to draft a dissent at the time mine is circulated.

3. **At your hearing, Senator DeWine noted some cases where you ruled in favor of an employee in an employment case. I would like to know if there are any cases, either at the Ohio Court of Appeals or the Ohio Supreme Court level, in which you dissented in favor of an employee in either an employment case or in a workers' compensation case.**

   I have been unable to recall a case during my seven-year tenure where the majority of the Ohio Supreme Court decided an employment case in favor of an employer. The exception seems to be the plurality opinion in *Byrnes v LCI*. Thus, I lacked occasions to offer a dissent in favor of an employee.

   I did, however, join majority opinions that favored employees including: *Rice v. CertainTeed* (1999), 84 Ohio St.3d 417 (awarding punitive damages in civil

employment discrimination action); *Ruckman v. Cubby Drilling* (1998), 81 Ohio St.3d 117 (holding that drilling company workers injured in auto accident on way to drilling site were entitled to workers compensation); and *State ex rel Highfill v. Industrial Commission* (2001), 92 Ohio St.3d 525 (affirming an award for violation of specific safety requirement).

4. **At your hearing I asked you about the case of Gliner v. Saint-Gobain Norton Industrial Ceramics Corp., 732 N.E.2d 389 (Ohio 2000), and I mentioned that I was concerned about your vote to overturn a jury's determination. This was a case where a jury determined there was sufficient evidence to find that the plaintiffs were victims of discrimination, but the appellate court overturned that finding. A majority of the Ohio Supreme Court disagreed, and found that the appellate court applied the wrong legal standard in trying to substitute its judgment for the jury's. Your answer at the hearing seemed to focus on the fact that the appellate court wrote a long opinion and that the Supreme Court wrote a short one. But it doesn't take much space to explain that the standard you advocated was simply wrong, and that the jury verdict must stand unless reasonable minds could come to only one conclusion -- that the employer was not liable. Can you explain why you believe that in this case there was no way reasonable minds could conclude there was discrimination?**

   Ohio follows federal jurisprudence in the area of discrimination law. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2002), the United States Supreme Court established parameters for federal appellate courts reviewing the application of Fed. R. Civ. Proc. 50 to McDonnell Douglas cases, and emphasized its determination not to "insulate an entire category of employment discrimination cases from review under Rule 50." The majority opinion applied a "some evidence" standard instead of the appropriate Civ. Rule 50 standard in the manner the recently announced *Reeves* decision counsels. My view was that the majority failed to apply the standard of review correctly, thereby insulating the case as the United States Supreme Court warned against. My opinion for the three dissenting judges pointed out that the court of appeals thoroughly analyzed the matter according to the established *Reeves* approach, while the majority decided the case without any analysis.

5. **Again, in Byrnes v. LCI Communications, 672 N.E.2d 145 (Ohio 1996), your position discounts the jury's verdict, and sets up a very difficult situation for victims of employment discrimination. The plaintiffs in this case produced powerful evidence of age discrimination through statements made by the employer about the relative merits of having a younger staff. The employer said he wanted "to bring in young, aggressive staff managers and change out the old folks," that "some of the older folks there could no longer contribute," and said that a certain worker was, "too old to grasp the**

concepts that he was looking for," and that he didn't, "want old marathoners in my sales organization . . . I want young sprinters."

Despite these blatant statements of age discrimination, and despite a $7.1 million jury verdict for the employees, the opinion you were a part of said this evidence was not enough to prove discrimination because it was more than a year before the adverse employment actions, was not specifically about the employees in question, and was not purportedly made in the context of the decision making about these employees. Essentially, you rejected the possibility that circumstantial evidence could be used to prove a discriminatory motive, and discounted the very strong evidence otherwise available to the plaintiff.

It seems to me that the logical extension of this position would be a new rule making inadmissible even the most blatant and obnoxious discriminatory statements, as long as they do not specifically mention the plaintiff within the year before the adverse action. How can that be right under current anti-discrimination law? And how do you defend your vote to disregard the judgment of the jury?

Five of seven justices agreed that the plaintiff could not recover in this case. This opinion did not set forth any admissibility rule at all. Rather, the court engaged in typical insufficiency of the evidence analysis. Consistent with anti-discrimination laws, the analysis required the employee to establish a causal link or nexus between the statements and the termination. The employees failed to do this. The Chief Justice and I therefore joined Justice Stratton's opinion finding that there was insufficient evidence of a causal link or nexus between alleged discriminatory statements or conduct and the prohibited act of discrimination. In reversing, the plurality opinion noted that only one of the remarks related specifically to either of the plaintiffs, and that that remark was not voiced by the individual who terminated the plaintiffs. The alleged discriminatory statements were distant in both fact and time; indeed, many of the comments were made years before plaintiffs Byrnes and Otto were even employed at LCI. Moreover, the comments related to the position of administrative secretary and marketing executive, while Byrnes and Otto were employed at the executive level. Overall, we thought that the remarks had no connection to plaintiffs and therefore could not support the inference that their discharges were the result of discriminatory intent.

6. **In Russell v. Industrial Commission of Ohio, 696 N.E. 2d 1069 (Ohio 1998), you were severely criticized by the majority for advocating an approach that ignored the plain language of the statute and relevant precedent. At issue in that case was the payment of workers' compensation benefits. The plaintiff in this case argued that those benefits could not be terminated until a hearing was held and that he should not have to repay benefits already paid him**

before the hearing. A majority of your Court agreed with him, saying that the opinion you wrote:

> **[L]acks statutory support for its position [and] has been unable to cite even the slightest dictum from any case to support its view . . . . [T]he dissent's argument, which has not been raised by the commission, the bureau, the claimant's employer, or any of their supporting amici, is entirely without merit. Id. at 1073-74.**

This is pretty harsh criticism from your colleagues, and their majority opinion is quite emphatic that you got the law wrong. Do you think it was proper to deny workers a meaningful opportunity at a hearing to determine if they are still injured? And how did you think it fair to require the repayment of possibly years' worth of benefits after the resolution of a dispute over eligibility?

I believe that I properly applied the facts to the law in this case. However, my limited function as a judge in this case did not include deciding which payment scheme I would favor, or which payment scheme was more fair. Instead I interpreted the statute as it was passed by the General Assembly. That interpretive process led to the conclusion that I reached.

7. **I am also concerned about the criticism you received from your colleagues in a case case about compensation for injured workers called Bunger v. Lawson, 696 N.E.2d 1029 (Ohio 1998). In that case, you dissented from the majority's common sense approach regarding available remedies for a convenience store employee, Rachel Bunger, who suffered serious psychological trauma as the result of being robbed at gunpoint. She alleged that her employer was negligent in not having a working alarm system, a properly functioning telephone, or a key to lock the door to prevent re-entry by the robber, and filed both a workers' compensation claim and a tort action, both of which failed. The lower court held that she could not receive workers' compensation because her psychological injury was not a result of a physical injury, but they also held that she could not sue under her only other avenue of recourse, a tort action, because her psychological injury happened during the course of her work.**

   On appeal, the majority of the Supreme Court of Ohio clearly saw that such a resolution was unfair to the worker and contrary to the law. They said that Ms. Bunger could pursue a tort remedy, and called the interpretation of the law you endorsed, "an absurd interpretation that seems borrowed from the pages of Catch-22." They said your view of the law was "nonsensical," and said that it, "leads to an untenable position that is unfair to employees." Id. at 1031.

You discussed this case with Senator Kennedy at your hearing, but I did not find your answer satisfactory. In your answer, you said you believed that the law in Ohio provides for compensability that is "narrower than immunity." In other words, it is the Catch-22 that the majority talks about – workers can be left out in the cold with no compensation for a genuine injury. Your response to that dilemma was that, "that's exactly how the law was written, and that is my job, to read it precisely."

Justice Cook, why were you not required to go beyond the problem presented by the "nonsensical" legal position presented and interpret the law in accordance with basic notions of fairness and justice? Why did you ignore one of the basic canons of statutory construction, applicable in Ohio, requiring, "the courts . . . to avoid an unreasonable or absurd result, or unreasonable, absurd, or ridiculous consequences." (85 Oh. Jur. § 289)?

I based my dissent in this case on the fact that a legislative body has wide latitude in determining the state's public policy, and as a result, I respectfully do not believe that this would be viewed as a legal absurdity. It may be a policy choice with which some may disagree and even disdain. It is nonetheless within permissible bounds and I believe that it is the role of a democratically elected body such as the General Assembly and not the court to balance all the competing interests and determine the rules that necessarily dictate a certain outcome. I therefore felt bound to uphold the legislative choice.

8. **In a case about the possibility of recovery on a tort-based claim, Vance v. Consolidated Rail Corp., 642 N.E. 2d 776 (Ohio 1995), you were the lone dissenter, voting to deny the possibility of recovery to a worker. In this case, the Ohio Supreme Court was asked to reverse the appellate court's decision to vacate a jury's verdict in favor of a railway worker claiming negligent infliction of emotional distress under the Federal Employers' Liability Act (FELA). Relying on a subsequently decided case on point in the Supreme Court of the United States, the Ohio Supreme Court majority found that the plaintiff met the threshold standard for bringing these sorts of claims under FELA, namely that he fell within the "zone of danger," or was, "placed in immediate risk of physical impact by Conrail's negligence. . . [because] important safety devices were denied to him, . . . a fellow employee came at him with a chipping hammer, and . . . a fellow employee attempted to run him over." Id. at 283. The majority's explanation tracked the language of the U.S. Supreme Court almost exactly. ("Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." Consolidated Rail Corp v. Gottshall, 512 U.S. 532, 556 (1994)).**

The majority read the clear language of the plaintiff's complaint to describe a claim for negligent infliction of emotional distress by the defendant

employer because of a failure to provide a safe work environment, and held that under Gotshall the claim could survive. But you misstated the nature of the complaint, turning it into an action finding fault with the "intentional acts of a co-employee," and insisted that, "such claims may be brought under FELA . . .only when there is a physical injury, not a purely emotional injury." Vance, 642 N.E. 2d at 242.

Can you explain why this is not a misreading of Gottshall, which seems to allow for emotional injuries under FELA, when it says:

> **A right to recover for negligently inflicted emotional distress was recognized in some form by many American jurisdictions at the time FELA was enacted and this right is nearly universally recognized among the States today. Moreover, we have accorded broad scope to the statutory term "injury" in the past in light of FELA's remedial purposes. We see no reason why emotional injury should not be held to be encompassed within that term, especially given that "severe emotional injuries can be just as debilitating as physical injuries." We therefore hold that, as part of its "duty to use reasonable care in furnishing its employees with a safe place to work," a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury. 512 U.S. at 550 (citations omitted).**

And further when it explains:

> **The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms. 512 U.S. at 544 (citations omitted).**

With all due respect, I do not believe that my opinion was a misreading of *Gottshall.* According to the holding in that case, recovery for negligently inflicted, purely emotional injuries, is limited to "zone of danger" situations. In the *Vance* case, however, the plaintiff premised his claim on a hostile work environment produced by sporadic, intentional incidents of harassment by various co-workers. Because these acts are not within the narrow limits of a "zone of danger" test, i.e., fright caused by imminent physical peril, there was not a cognizable claim for negligent infliction of emotional distress. In my view, the incidents such as the rat in the lunch box, the scratched car, the taunting etc. did not meet the "zone of danger" standard.

The two incidents involving threats of physical peril, the chipping hammer incident and the co-worker trying to run down Vance with a vehicle in the yard, are intentional acts and thus did not fit the *Gottshall* constraints. The railroad had a duty to avoid subjecting Vance to negligently inflicted emotional injury as defined by the "zone of danger" test.

Both the majority and concurring opinions considered the applicability of a theory of negligent supervision to this case. In my view, that theory failed for two reasons. First, limitation of the purely emotional claims to "zone of danger" scenarios is the import of the *Gottshall* decision. Second, even if one could recover for purely emotional injuries under a negligent supervision theory, Vance did not present evidence that either the chipping hammer incident or the attempted rundown was committed through employer negligence. Vance offered no evidence that the employer had notice of this behavior, thereby triggering the employer's duty to discipline or discharge such employee. Of critical importance is the fact that, in most of the incidents, no culprit was even identified. Rather, it is only by evidence of a "pervasive" attitude in the company that the majority holds the employer to the nebulous duty "to deal with the problems" in Vance's work environment.

9. **In Johnson v. BP Chemicals, 707 N.E.2d 1107 (Ohio 1999), your view of the legislature's attempt to insulate employers from suit leaves almost no room for recovery by injured workers. In this case, a majority of the Ohio Supreme Court held unconstitutional a state statute creating virtual immunity for employers from lawsuits alleging intentional torts in the workplace. Explaining that the Ohio legislature had, "created a cause of action that is simply illusory," the majority found that the statute could not survive the Ohio Constitution's mandate that permitted the General Assembly to create laws that further, "the comfort, health, safety and general welfare of all employees." Id. at 1113-14.**

Your dissent takes a narrow view of the Ohio Constitution's concern for workers, and seems to say that the legislature is permitted to deny any and all remedies to certain employees. Of the constitutional mandate relied upon by the majority, you wrote, "[t]his section does not say that the General Assembly may pass only laws that provide for the comfort, health, safety and general welfare of all employees. It also does not say that no law may ever be passed that does not provide for the comfort, health, safety, and general welfare of employees. There is nothing in this grant of authority that can properly be read as a limitation on authority." Id. at 1116. In addition, you do not follow the clear precedent of a 1991 case, Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991), on which the majority relies in this ruling.

How do you explain yet another ruling that disfavors workers?

In writing my dissent, my intent was not to disfavor workers but rather to uphold the work of the legislature that sought to carry out the public will through enacting tort reform legislation. I expressed no view as to the wisdom of that legislation or the balancing of interests that it encompassed. I challenged the majority's reasoning for determining that the enactment was unconstitutional.

10. **In Davis v. Wal Mart, 756 N.E. 2d 657 (Ohio 2001), you were the sole dissenter against a widow whose husband's employer had lied in order to get her to accept a smaller settlement. The plurality in this case wrote that, "[i]n order for our legal system to work, pursuant to our rules of procedure, a litigant must have the ability to investigate and uncover evidence after filing suit. The intentional concealment or destruction of evidence not only violates the spirit of liberal discovery but also reveals a shocking disregard for orderly judicial procedures and traditional notions of fair play. Damage is caused not only to the parties to the suit, but also to the judicial system and the public's confidence in that system. Wal-Mart harms the sanctity of the judicial system and makes a mockery of its search for the truth." Doesn't your position just reward corporate defendants for concealing evidence?**

    With all due respect, I do not believe that my dissenting view in this case rewards corporate defendants who conceal evidence. Mrs. Davis won her intentional tort case against Wal-Mart for the wrongful death of her husband. The jury awarded her damages of $2 million and awarded her prejudgment interest on that amount based on the egregious conduct of the employer on the subject of workplace safety. It is only with respect to her second, later-filed case that I dissented.

    After the trial court entered judgment for Mrs. Davis, she brought a spoliation claim against Wal-Mart. Because that claim arose out of a common nucleus of operative facts as in the intentional tort case that she won, Mrs. Davis' later claim reasonably was determined by the trial court to be barred by the doctrine of res judicata.

    Though Mrs. Davis argued that her cause was not barred because Wal-Mart had hidden evidence, her spoliation complaint focused on (1) "Exhibit A," which Davis admittedly discovered before her first intentional tort case went to trial, and (2) a Sam's Club claims file, which Davis admittedly obtained in conjunction with her motion for prejudgment interest in the intentional tort case.

11. **In Norgard v. Brush Wellman, Inc., 766 N.E.2d 977 (Ohio 2001), you rejected what I thought was the right approach by the majority, and wrote a dissent in a case about the statute of limitations for bringing an intentional tort action against one's employer. Here, the plaintiff worked in contact with beryllium, and developed chronic beryllium disease over the period of time he was employed with defendant. While he knew he had the disease, was studied by doctors paid for by worker's compensation, and even received counseling at the recommendation of the company physician for the effect of his illness on his life, Norgard did not know until years after first falling ill that the company had withheld important information about exposure levels, air-sampling and ventilation problems. The majority said that it was upon learning this latter information that the clock began to run on the employee's ability to bring suit against the employer for an intentional tort. They explained that, "this holding is consistent with the rationale underlying a**

statute of limitations and the discovery rule. Its underlying purpose is fairness to both sides....[I]f a plaintiff is unaware that his or her rights have been infringed, how can it be said that he or she slept on those rights? To deny an employee the right to file an action before he or she discovers that the injury was caused by the employer's wrongful conduct is to deny the employee the right to bring any claim at all." You rejected this common sense approach, saying that the period began to run years before, when the employee contracted the illness in question. Why is that not a reward to the company for its intentional bad behavior?

I believe that our legal system does hold employers accountable for unlawful conduct. I based my dissent in this case on a legitimate jurisprudential rule. Enforcement of statutes of limitations and appropriate accrual dates for application of discovery rules protect individuals and employers alike from stale claims.

The law fairly protects injured workers from a deceiving employer by providing that the limitations period does not begin until an employee knows that he/she has been injured and its cause. In this case, the majority's rule rests the date of accrual on a plaintiff's recognition of his or her legal rights. In dissent I pointed out that was fundamentally flawed and contrary to the United States Supreme Court ruling in *Rotella v. Wood*, 528 U.S. 549 (2002), in which the court observed in an analogous context: "[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock...."

12. **In Humphrey v. Lane, 728 N.E.2d 1049 (Ohio 2000), you dissented from a majority decision finding that a state prison violated a Native American prison guard's rights for firing him because he refused to cut his hair due to his religious beliefs. The majority found that the Ohio Constitution gives state citizens broader rights than the federal Constitution after Justice Scalia's majority decision in Smith v. Employment Division, 494 U.S. 872 (1990), because Ohio interference with free exercise of religion requires a compelling state interest and least restrictive means. The Ohio Supreme Court found that less restrictive means were available to the state to enforce its interest in uniformity (for example, the guard could wear his hair tucked under a cap). Why did you reject the conclusion that the Ohio Constitution is broader than the U.S. Constitution on this point, and why did you not believe that it would be less restrictive to permit the guard to tuck his hair under his cap rather than violate sincerely held religious beliefs?**

Here the Ohio Supreme Court declined to align Ohio's jurisprudence with that of the federal courts following *Smith*. To support its departure from the Supreme Court's free exercise jurisprudence, the majority cited the textual differences between Ohio's Constitution and the First Amendment. But just one year before,

in *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, the Ohio high court determined that even though the text of Section 7, Article I of the Ohio Constitution is "quite different" from the First Amendment, Ohio's religion clauses are, nevertheless, the "approximate equivalent" of those found in the Bill of Rights. Accordingly, the Ohio Supreme Court adopted the federal *Lemon* test for Establishment Clause claims asserted under the Ohio Constitution because the Lemon test is "a logical and reasonable method by which to determine whether a statutory scheme establishes religion." *Id.* at 10, 711 N.E.2d at 211. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). My dissenting view was that Ohio's Free Exercise Clause should be analyzed according to the *Smith* rationale for the same reason that our *Simmons-Harris* decision applied *Lemon* to Ohio's Establishment Clause. *Smith* reasoned that the application of the compelling-state-interest test to all free-exercise claimants is neither logical nor reasonable.

13. I was concerned about an opinion you wrote denying a legal remedy to victims of exposure to DES. Sutowski v. Eli Lilly & Company, 696 N.E.2d 187 (Ohio 1998). You wrote that plaintiffs claiming damage to their reproductive systems due to in utero exposure to DES, a drug known to cause cancer and reproductive disorders, could not rely on the market-share theory, a theory virtually invented for DES cases where hundreds of companies manufactured the drug but the victims would have no idea by whose drug they were affected.

The dissenters were outraged by this opinion and criticized you in quite harsh terms. Justice Douglas in dissent explained that, "[t]he majority . . . rings the death knell for most of the DES litigation in Ohio." Id. at 193. He continued, "[t]he majority's holding in this case is not only contrary to general notions of fairness and equity, but it is also predicated on numerous misstatements and misapplications of law. . . the majority quite simply does not wish to recognize market-share liability and, to that end, it has concocted a rationale to support its predetermined conclusion that market-share liability is not a viable theory of recovery in Ohio." Id. Douglas further said that the majority, "selectively quoted," from a prior Ohio case, "to create the impression that the General Assembly is the only appropriate body to recognize the market-share liability theory in DES litigation. The majority then uses that misguided impression as a platform for launching into a tortured analysis of Ohio's Products Liability Act. It is here that the majority's shell game becomes most deceptive." Id. at 197. He went on to explain why there is no reason not to recognize the market-share theory consistent with Ohio law, and added that the majority's one sentence "expression[] of condolences will ring hollow indeed, particularly when the victims of DES read the flummery set forth in the majority decision." Id. at 200.

Also in dissent, Justice Pfeifer expressed serious disagreement with your majority opinion, saying:

> **It is unconscionable that any profoundly injured woman of the estimated four hundred thirty thousand Ohio women who took DES should be prohibited from successfully pursuing constitutionally protected compensation for injuries done simply because she can only trace the harm to a group of manufacturers of the same product. . . . With their answer to the certified question [in this case], the majority is more comfortable shielding the defendant drug companies than with applying a theory of recovery that would allow the plaintiffs to go forward with their case. The majority's decision has the perverse effect of protecting a defendant class that undeniably manufactured, released, and profited from a horribly defective product while denying a chance of recovery to a class of injured women that undeniably did nothing wrong, except suffer the consequences of the ingestion of the defendants' defective drugs. The right-to-remedy clause has been turned on its head and the majority has effectively given these defendants the equivalent of a common-law right-immunity. DES-injured women will have to content themselves with knowing that they 'engender sympathy.' Id. at 201 (emphasis added).**

Again, it seems you have worked hard to reinterpret legal decisions in a way that disallows compensation to the injured. How else can you explain the case?

I don't believe my record can be construed to suggest that I seek to reinterpret legal decisions in a way that disallows compensation to the injured. The Ohio Supreme Court decision in this case declining to alter Ohio's traditional tort principles for such cases by eliminating the need to show a defendant's fault, is a defensible jurisprudential decision. Indeed, it corresponds with more than half of the states that have considered the subject of market-share liability.

RESPONSES OF DEBORAH COOK TO QUESTIONS FROM SENATOR GRASSLEY

1. **Have you ever expressed views on the False Claims Act, its *qui tam* provisions, or of the rights of whistleblowers? If so, please provide me with those views and the circumstances under which they were expressed.**

   I have never expressed my personal view on the False Claims Act, its qui tam provisions or the rights of whistleblowers. I have, however, participated in Ohio Supreme Court cases involving state whistleblower protection legislation. One such case is discussed below in response to Question #4.

2. **What are your views on the constitutionality of the *qui tam* provisions of the False Claims Act?**

   I have not yet been called upon to form a judicial judgment on the constitutionality of any aspect of this Act. Any view of its constitutionality that I would adopt in a judicial opinion would be based on the precedent from the Sixth circuit and from the U.S. Supreme Court.

3. **Do you agree with the view that the False Claims Act and its *qui tam* provisions should be given a broad and expansive reading and that such was intended by Congress in enacting the FCA and the 1986 Amendments thereto?**

   I believe that it is customary for appellate judges to give remedial legislation a broad reading. Furthermore, Congressional acts deserve a strong presumption of constitutionality and I believe that these standards should apply to the FCA and its qui tam provisions.

4. **Would you please explain your dissent in *Kulch v. Structural Fibers, Inc.*?**

   My view in the *Kulch* case was that the General Assembly intended that the statutory scheme to protect whistleblowers was the exclusive remedy available to this plaintiff. In my dissent I concluded that Ohio Revised Code section 4113.52 was the exclusive Ohio remedy, having supplanted existing Ohio common law remedies. I differed with the rationale of the majority opinion that hinged on no more than a contrary legislative preference; the court simply deemed the statutorily provided remedy not "ample or complete" and my view was that it was up to the General Assembly, and not the court, to determine that. Any suggestion that my opinion in this case evinces hostility toward whistleblower protections is unfounded and simply untrue.

Submitted 2/5/03

Deborah Cook, Justice

RESPONSES OF DEBORAH COOK TO QUESTIONS FROM SENATOR KENNEDY

Question #1

You stated at your hearing that "consensus is the first objective" in deciding a case as a judge. (R. 299). Moreover, you stated that in deciding cases you merely "attempt[] to do a precise reading of the law." (R. 299). Nonetheless, you have authored more than 300 dissents while on the Ohio Supreme Court, more than any other justice on the court. Moreover, you frequently dissent alone. Your fellow justices seem unable to make sense of many of your dissents, calling your reasoning such things as "an absurd interpretation that seem borrowed from the pages of catch-22." Bunger v. Lawson, 696 N.E.2d 1029, 1031 (Ohio 1998). In another case, the majority of the court said that your dissent "lacks statutory support for your position and that you have been unable to cite even the slightest dictum" to support your view. State ex rel. Russell v. Indus. Comm., 696 N.E.2d 1069, 1074 (Ohio 1998). Your rating by the Ohio Chamber of Commerce, which tracks your votes for employers in cases affecting the environment, workers' rights and civil rights, is extraordinary: in many cases a 100% rating.

Dissents are an important part of the judicial process. Indeed they often serve a critical role in the development of the law. However, consensus-building is also very important, and is often essential to the development and maintenance of a coherent body of law, and your consistent, prolific dissents in favor of business interests are disturbing to me. What steps do you take to achieve consensus on the Ohio Supreme Court and do you believe that, in light of your record of dissents, you would be able to reach consensus with other judges as a member of the Sixth Circuit?

Response:
I respectfully submit that my experience on the Ohio Supreme Court with dissenting opinions indicates nothing more than my effort to espouse a reasoned view regarding which side of the dispute at bar is better supported by the relevant body of legal doctrine. Consensus is always a goal of mine and I attempt to build that consensus by carefully articulating my view of the case in light of the facts and the law. Many times my colleagues have decided to join my view. Other times the dissent serves to outline for the bench and the bar a contrary reading of the relevant decisional law or statutory language that led the dissenting justices and me down a different path. On several occasions, my dissents have been vindicated by a decision of the United States Supreme Court.

Courts value consensus among their members as a way of reaching a better decision. If dissents are resolved by judges' efforts to reach a better-analyzed opinion, one that satisfies difficult questions for more of the participating judges, then consensus has served the law.

I will continue to make such efforts to achieve consensus if I am confirmed.

Background for Questions #2 through #5

In Russell, you argued that worker's compensation benefits terminate, even retroactively, without a hearing, as soon as a non-attending physician says the claimant has reached maximum medical improvement ("MMI"). That case turned on Ohio Revised Code 4123.56, which states that "payments shall be for a duration based upon the medical

reports of the *attending* physician. If the employer disputes the attending physician's report, payments may be terminated *only upon application and hearing by a district hearing officer*." As the majority stated, and the court had held many times before, this language means that, regardless of when the claimant actually reaches maximum medical improvement, he or she is eligible to receive benefits until MMI is determined by a hearing officer. Id. at 1071.

You, however, would have denied benefits and made the claimant subject to recoupment, because the next section of R.C. 4123.56 states that, "payment shall not be made for the period in which any employee has . . . reached the maximum medical benefit." Id. at 1076 (Cook, J., dissenting). You read this language to mean that even if a claimant is determined to be eligible to receive benefits payments, he may be ineligible to keep them. Id. Thus, the claimant would be subject to recoupment back to the date on which he was determined at the hearing to have reached MMI. To reach this conclusion, you would have overturned a long line of Ohio cases, but you do not assail two cases central to, and sufficient for, the majority's position, State ex rel. MTD Products, Inc. v. Indus. Comm., 669 N.E.2d 846 (Ohio 1996) and AT&T Technologies v. Indus. Comm., 623 N.E.2d 63 (Ohio 1993). See Russell, 696 N.E.2d at 1074. You also rely on an argument that was not raised either in the courts below, or in the Supreme Court itself. Id.

Question #2

What is your view of the role of stare decisis and why would it not have precluded your overturning the cases you would have overturned in Russell?

Response:
My view of stare decisis is that predictability and the rule of law depend on courts respecting precedent, and I am therefore bound by it. But courts nevertheless should be vigilant in retreating from erroneously decided cases or precedent that has, due to intervening changes in the law, lost its legal underpinning. In the *Russell* case, I posited in dissent that the court should reconsider *State ex rel. McGinnis v. Indus. Comm.* (1991), 58 Ohio St.3d 81, 568 N.E.2d 665 because the cases it relied upon do not, in my view, justify the decision.

Question #3

In light of the fact that this argument was not raised by any party or any amici, at any level in the litigation, why did your consideration of it not constitute a departure from Ohio practice?

Response:
In my view, the arguments made by the state fairly encompassed the position I espoused in dissent on behalf of myself and the Chief Justice. The majority's decision disregarded three workers' compensation tenets: *Indus. Comm. V. Dell* (1922), 104 Ohio St. 389, 135 N.E. 669 prohibition against fund misapplication; the prohibition against claimant windfalls pronounced in *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 551 N.E.2d 1265; and the "some evidence" rule. In addition, it essentially renders meaningless the prerequisites to TTD compensation set down in *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586.

Question #4

How do you respond to the contention that your reading of 4123.56 would lead to the absurd result that a hearing officer would be allowed to order recoupment back to the date of a nonattending physician's report, but that same hearing officer would not have the power to actually terminate compensation?

Response:

My reading of the statutes was an attempt to objectively decide the case. In my dissent I offered an analysis with which the majority disagreed. In our view the language of R.C. 4123.56(A) conflicted with the majority's position. It stated: "[P]ayments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer * * *. Payments shall continue pending the determination of the matter, however *payment shall not be made for the period in which any employee has * * * reached the maximum medical improvement.*" (Emphasis added.)

The recoupment provisions of R.C. 4123.511(J), in correlation with the above-emphasized language, are directed at claimants who have been "found to have received compensation to which the claimant was not entitled". R.C. 4123.511(J) demonstrates a legislative expectation that compensation will be repaid by claimants who do not meet the eligibility criteria. Non-eligibility criteria dictated the right to recoupment. I opined that the payment of continued benefits pending a hearing to determine eligibility does not equate with eligibility. A claimant may be eligible to receive payments, but later determined to be ineligible to retain those payments. This analysis included a view regarding how this was a sensible legislative approach to accommodate the reality that the system does not permit instantaneous hearings. My dissent was nothing more than an attempt to effectuate the will of the General Assembly, the body properly charged with the duty of weighing the competing interests and making determinations of policy.

Question #5

Ordering recoupment of benefits often leads to economic hardship for families, because the funds to be recouped (and which the family was entitled to receive) very often went immediately to meeting day-to-day needs that are so critical when a family member is on disability. You have stated before that your legal reasoning does not take into account the effect on the individual litigants. Indeed, you have stated that "I don't think I deserve any blame for the legislation that I am asked to construe or interpret." (R. 323). If your reading of a statute would result in extreme hardship to one litigant (as it often has), would that lead you to conclude that that reading of the statute at issue was likely not what the legislature intended?

Response:

Certainly if statutory language accommodates two equally reasonable interpretations and one of the two interpretations avoids individual hardship without imposing unfairly on other parties, that reading would be the preferred one.

Question #6

In Norgard v. Brush Wellman, Inc., 766 N.E.2d 977 (Ohio 2002), the defendant corporation withheld information concerning the amounts of Beryllium to which its employees were exposed, its knowledge of the flaws in its air sampling program, and its ventilation problems. Your dissent in this case would have held the suit time-barred, because in your opinion the defendant's deceit was not sufficient to toll the statute of limitations. Id. at 982. In reaching this conclusion, you explain that the justifications of the "discovery" rule for tolling statutes of limitations do not cover the set of facts in that case. Id. In undertaking this analysis, your legal reasoning included a weighing of the policy implications behind the discovery rule. Moreover, in describing this case, you said that "my considered judgment and I think reasoned judgment was that that was beyond the discovery rule and the particular statute of limitations here." (R. 335). You later state that you wanted to avoid "contorting the law of statute of limitations beyond the scope of its justification[.]" (R. 334).

As you have stated in describing this opinion and others, the legal decision-making process often requires judges to examine and weigh policy considerations. Understanding what policy considerations a particular judge finds important is therefore critical to the confirmation process. What would inform the policy considerations you would undertake and if confirmed?

Response:
When the decisional process allows for consideration of policy, as is the case when faced with ambiguous statutory language, I would generally restrict my policy considerations to those that the parties brief for the court.

Background for Questions #7 and #8

In DeRolph v. Ohio, 728 N.E.2d 993 (Ohio, 2000) you were confronted with overwhelming evidence that state funding of public schools was woefully inadequate. In fact much of the evidence in that case showed that children were attending schools that were in dangerous disrepair, with poor sanitation and few, if any, resources for education. The majority cited binding precedent for the point that when a school district is starved for funds, or lacks teachers, buildings, or equipment," those condition violate the Ohio Constitution's guarantee of a "thorough and efficient" education. See, e.g., Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923); Cincinnati School Dist. Bd. of Edn. v. Walter, 390 N.E.2d 813, 825 (Ohio 1979).

Your dissent does not address the cases it would overturn, and instead merely states that the constitutional provision at issue is too vague to be self-executing. You analogize

the provision to another provision of the Ohio Constitution that says that "all citizens possess inalienable rights to life, liberty, property, happiness, and safety." DeRolph, 728 N.E.2d at 1036. Your dissent was harshly criticized, and in particular it was said that if your position had prevailed it would have turned "200 years of constitutional jurisprudence, dating back to Marbury v. Madison, on its head." Id. at 1028.

Question #7

Why did you feel that stare decisis did not require you to vote with the majority to give effect to the education provision of the Ohio Constitution?

Response:
The evidence in this case indeed showed that some schools in Ohio were in a deplorable state. But my dissenting view proceeded from the premise that the parties to the case stipulated that every one of the school districts in the state of Ohio met minimum state requirements. I viewed the policy decisions as to what funding was necessary, beyond the set state minimums, as being textually committed by the Ohio Constitution to the General Assembly.

The majority of the court did not hinge its decision on stare decisis. The prior decision in Ohio found the funding scheme constitutional. In fact, the majority of the court of appeals relied on *Cincinnati School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, and found that the current system of school funding was constitutional. Justice Sweeney's majority deemed the *Walter* case not controlling. Justice Sweeney said "we reject appellees' contention that *Walter* is controlling. The equal yield formula challenged in *Walter* was repealed shortly after the case was decided. Moreover, *Walter* involved a challenge to only one aspect of school funding. In contrast, the case at bar involves a wholesale constitutional attack on the entire system."

Question #8

Does your analogy to the "life, liberty, property, happiness and safety" language of the Ohio Constitution signify that you would hold similar language on the U.S. Constitution unenforceable in some contexts?

Response:
My opinions in the many *DeRolph* decisions did not hold that the provisions of the constitution were unenforceable. Rather, I viewed the exercise by the majority as untenable because there existed no jurisprudentially sound basis for deciding the questions of quality and budgeting that the case presented.

Background for Questions # 9 and #10

Few, if any, of your opinions from the Ohio Supreme Court have dealt with abortion rights. Your views on this important matter are not well-known, yet your nomination to the Sixth Circuit has been endorsed by Ohioans For Life, an anti-choice group.

Question #9

As an appellate judge, you would be constrained by binding Supreme Court

precedent, including Roe v. Wade and its progeny. However, circuit courts play an important role in the protection of abortion rights, and your views on this line of cases are therefore important. What is your view of the abortion rights and their continued vitality?

Response:

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), affirmed the court's decision in *Roe v. Wade* and upheld a woman's right to an abortion. These decisions are settled law and I will follow *Casey* and other Supreme Court cases protecting the reproductive rights of women.

Question #10

Have you had any contact with members or representatives of Ohioans For Life or other anti-choice groups concerning your nomination to the Sixth Circuit, or in the process of your prior judicial campaigns? If so, what views did you express with respect to abortion rights?

Response:

I do not believe that I ever met anyone from this organization in my prior judicial campaigns. I did not seek the endorsement of this group and indeed did not even know at the time that I had received it. Nor have I discussed my nomination to the Sixth Circuit with any of these groups or expressed views regarding abortion rights.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN TO DEBORAH COOK

1. I would like to ask you about your dissent in Humphrey v. Lane. In that case, you alone on the Ohio Supreme Court would have allowed the state Department of Corrections to fire a long-time Native American employee because his religious beliefs prohibited him from cutting his hair to conform to the Department's grooming policy. For years, Mr. Humphrey had been permitted to wear his hair tucked up under his uniform cap without any problem, until an administrator insisted that he cut his hair, although doing so would violate his sincerely held religious beliefs.

When Mr. Humphrey wore his hair under his uniform cap, as he did whenever he was on duty, it was "impossible to tell" – those were the words of the trial judge – that his hair was not short. You alone would have allowed the state to fire Mr. Humphrey if he refused to cut his hair, even though the trial judge found as a factual matter that it was not necessary for him to cut his hair to satisfy the state's interest in having a grooming policy.

As I understand your dissent in this case, you do not believe that the government needs to have a "compelling interest" before it can make an individual violate his or her sincerely-held religious beliefs in order to make that person conform to a so-called "neutral" law, even when the government's interest can be satisfied by some lesser means. This was the same view adopted in a federal case, the Smith case, by Justice Scalia and a majority of the U.S. Supreme Court, and subsequently rejected by a substantial bipartisan majority of Congress, which passed the Religious Freedom Restoration Act to overturn it. Why would you have allowed Mr. Humphrey to be fired without examining whether the state had a compelling interest in its grooming policy? Could that interest be satisfied without requiring him to cut his hair in violation of his religious beliefs?

Response:

Here the Ohio Supreme Court declined to align Ohio's jurisprudence with that of the federal courts following *Smith*. To support its departure from the Supreme Court's free exercise jurisprudence, the majority cited the textual differences between Ohio's Constitution and the First Amendment. But just one year before, in *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, the Ohio high court determined that even though the text of Section 7, Article I of the Ohio Constitution is "quite different" from the First Amendment, Ohio's religion clauses are, nevertheless, the "approximate equivalent" of those found in the Bill of Rights. Accordingly, the Ohio Supreme Court adopted the federal *Lemon* test for Establishment Clause claims asserted under the Ohio Constitution because the Lemon test is "a logical and reasonable method by which to determine whether a statutory scheme establishes religion." *Id.* at 10, 711 N.E.2d at 211. *See Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. In *Humphrey*, my dissenting view was that Ohio's "Free Exercise" Clause should be analyzed according to the *Smith* thinking for the same reason that our *Simmons-Harris*

decision applied *Lemon* to Ohio's "Establishment Clause." *Smith* reasoned that the application of the compelling-state-interest test to all free-exercise claimants is neither logical nor reasonable.

2. An appellate court judge must give deference to the factual findings of a trial court judge, the only judge who sees and hears the witnesses and evidence first hand. Here, the trial court found as a matter of fact that Mr. Humphrey could wear his hair tucked up under his cap and that it would be impossible to tell that his hair was long. All of your colleagues on the Ohio Supreme Court gave deference to that factual finding. Why did you disagree with them, and with the trial court?

Response:
My difference with the majority centered on whether the Ohio Constitution's "religion clauses" should be interpreted independently from or coextensively with the United States Constitution, and as a corollary to that, what level of scrutiny was appropriate to apply to this state regulation. I did not disagree with the trial court's factual findings. The trial court's factual finding would not have changed the result dictated by *Smith*.

3. Suppose the state of Ohio determined that the consumption of alcohol in any public place, in any amount, is a harmful thing, and by law made the state totally "dry" –that is, it prohibited the serving and consumption of alcohol in any public place. This would be a neutral law, not one aimed at any religious practices, but it would have the effect of prohibiting the use of wine at communion in churches, and for holiday rituals in synagogues, not to mention many other religious uses. Suppose the religious institutions sue the state, and invoke the same religious liberty provisions of the Ohio Constitution that Mr. Humphrey invoked. As I understand your position in Mr. Humphrey's case, if it had been adopted, the Ohio courts would have to rule against the churches, would they not?

Response:
This hypothetical presents a somewhat different issue with the addition of the religious institutions (presumably seeking injunctive relief) citing infringement on organized religious practices. In the absence of state constitutional grounds, the *Smith* decision would be one of the cases that informs the resolution of this case. I am unable to say whether Ohio courts would necessarily rule against the churches. My approach to deciding that question would be to review the record of proceedings, the contesting briefs, and the existing law to fully consider the case and its implications.

4. **Your dissent specifically acknowledges that the rule you wanted to adopt "could, at times, disadvantage religious minorities whose belief systems are inadvertently offended by generally applicable laws." How can you assure the American people that if confirmed to the Sixth Circuit, you will protect the constitutional rights of minorities, when they are threatened?**

Response:
I will do my best to follow the law. It is the law that assures all citizens that they will be treated fairly. I believe that my tenure as a state court judge indicates that I am committed to following both the Constitution and legislative enactments and that I faithfully attempt, in every case before me, to apply the relevant law to the facts of the case.

RESPONSES OF DEBORAH TO QUESTIONS FROM SENATOR EDWARDS

1. **Can you name any cases in which you dissented in favor of an injured employee in a claim brought against his or her employer?**

   I do not recall a case during my tenure where the majority ruled against an injured employee (except the plurality opinion in *Byrnes v. LCI*) and thus I have lacked occasion to dissent in favor of employees.

   I have, however, joined majority opinions that favored employees including: *Rice v. CertainTeed* (awarding punitive damages in civil employment discrimination action); *Ruckman v. Cubby Drilling* (holding that drilling company workers injured in auto accident on way to drilling site were entitled to workers compensation); and *State ex rel Highfill v. Industrial Commission* (affirming an award for violation of specific safety requirement).

2. **In *Bunger v. Lawson*, Rachel Bunger, who was working alone late at night at a Dairy Mart, was traumatized when the store was robbed at gunpoint. Because the Ohio Workers' Compensation statute does not cover psychological injury, it rejected Rachel Bunger's claim, so she sued in state court to collect money for psychological damage, including the counseling she had to go through. The premise of Workers' Compensation is to remove certain cases from the courts and to compensate injured employees through a kind of insurance paid for by employers. Based on that premise, injuries that are not covered, and that are therefore not "insured" by employers, may be redressed by suits by workers. The Supreme Court majority upheld Ms. Bunger's right to sue for her injuries. However, you dissented, using reasoning that was criticized by Justice Stratton, known as the court's second most conservative judge. You said that, even though Ms. Bunger's injury was not covered by Workers' Comp, she could not sue in state court. In other words, she had no remedy at all for her injury.**

   Justice Stratton stated, specifically, that the General Assembly had not enacted the provision you "wrote in" to your dissent: "An employee who sought compensation for a psychological injury under the system advocated by the appellees would be in a Catch-22 situation.... If employers want immunity under the workers' compensation system from civil actions for an employee's psychological injuries, employers should urge the General Assembly to include psychological injuries in the definition of "injury" in [the relevant statute].... Until it is... the employer should not be immune from civil liability for its negligence." What led you to conclude that the Legislature intended plaintiffs like Bunger to have no remedy at all?

You based your dissent on a 1939 case, in response to which the General Assembly amended the law to exempt employers from liability for suits related to an occupational illness, silicosis. Why do you find this case to be relevant in rejecting Bunger's claim today? What made you believe that Bunger's psychological injury constituted a "bodily condition" that rendered her claim not viable, when that amendment had been enacted to preclude suits for silicosis?

As stated in my *Bunger* dissent, *Triff v National Bronze & Aluminum Foundry Co.* (1939), 135 Ohio St. 191, 20 N.E.2d 232, bears on this case because there the Ohio Supreme Court took the same view that the court takes in *Bunger*. The Ohio General Assembly, however, met the *Triff* decision with an amendment to G.C. 1465-70 (now R.C. 4123.74) expanding the immunity/exclusivity provision. That amendment added the phrase "bodily condition" to obviate the *Triff* analysis, which had been pinned to the defined term "injury." The amendment read in part: "[Employers] shall not be liable * * * for any injury, disease, or bodily condition, whether such injury, disease or bodily condition is compensable under this act or not * * * ." Like the majority in *Triff*, the *Bunger* majority held that there is a right to maintain a common-law negligence suit upon claims for any kind of disability not caused by an "injury" as defined in R.C. 4123.01. According to the majority, "[s]ince psychological injuries are not included within the definition of 'injury' used in the statutory chapter, those injuries cannot be included in the chapter's grant of employer immunity from suit for any 'injury' suffered by an employee." The language of the immunity statute and the history of the jurisprudence on the subject contradicted the majority because, with the addition of the phrase "bodily condition," the analysis hinging on the statutory definition of "injury" lost persuasiveness.

Until *Bunger*, the only type of industrial injuries excepted from the constraint of R.C. 4123.74 had been those intentional torts where the employers' conduct had been determined to be outside the course and scope of employment and thus outside the scope of the Act, precluding the employer from availing itself of any of the protections afforded by the Act, such as the immunity provision in R.C. 4123.74. Because Bunger's psychiatric condition was a "bodily condition, received or contracted * * * in the course of and arising out of [her] employment," R.C. 4123.74 immunizes her employer from liability "at common law or by statute." Industrially caused psychiatric conditions unrelated to an injury or occupational disease do not, by definition, constitute compensable injuries, yet are "bodily conditions" arising from employment and therefore fall within the ambit of R.C. 4123.74.

3. **Please explain why you thought it appropriate that employers such as the one in *Bunger* gets a windfall by not having to insure against injury while**

not being liable in tort while, on the other hand, the injured employee gets nothing.

In writing the dissent in *Bunger*, I did not choose the law that imposed the "Catch-22". It was the Ohio General Assembly that determined by statutory definitions that an employee could suffer a "bodily condition" that is not compensable as an "injury" yet an employer would be immune from suit by that employee based on the work-related "bodily condition" suffered. The Ohio statutes at bar in the *Bunger* case explicitly provided employer immunity that was broader than the employee compensability definitions. My dissent expresses no judgment regarding the wisdom of such legislation, just an honest reading of it.

Responses to Senator Russ Feingold
Questions for Justice Deborah Cook

1. **In *Davis v. Wal-Mart*, the majority of your court held that the widow of a forklift operator killed on the job could reinstate her wrongful death suit against Wal-Mart because the company had instructed its employees to lie in order to stop her from finding evidence that would have increased the company's liability.**

   You dissented, stating that because the case had already been settled, Mrs. Davis could not sue even though critical information had been intentionally withheld from her by Wal-Mart.

   How is it possible that Wal-Mart should have won this case when it had engaged in such reprehensible conduct?

   Mrs. Davis won her intentional tort case against Wal-Mart for the wrongful death of her husband. The jury awarded her damages of $2 million and awarded her prejudgment interest on that amount based on the egregious conduct of the employer on the subject of workplace safety. It is only with respect to her second, later filed case that I dissented.

   After the trial court entered judgment for Mrs. Davis, she brought a spoliation claim against Wal-Mart. Because that claim arose out of a common nucleus of operative facts as in the intentional tort case that she won, Mrs. Davis' later claim reasonably was determined by the trial court to be barred by the doctrine of res judicata. Though Mrs. Davis argued that her cause was not barred because Wal-Mart had hidden evidence, her spoliation complaint focused on (1) "Exhibit A," which Davis admittedly discovered before her first intentional tort case went to trial, and (2) a Sam's Club claims file, which Davis admittedly obtained in conjunction with her motion for prejudgment interest in the intentional tort case.

   Do you believe that justice was done in this case?

   I believe that my dissenting view accords with justice under the law. Finality of judgments, as embodied in the doctrine of res judicata, is an important aspect of our justice system, and judges are bound to apply that doctrine where applicable.

2. **During your tenure as a Judge, there were thirty-seven employment cases, *Davis v. WalMart* being one of them, in which the Supreme Court of Ohio issued decisions on the merits. It is my understanding that you have never dissented from any decision of the Court in which the majority decision was**

favorable to an employer. At the hearing, you expressed some doubt about these statistics.

a. **Please list any case in which the majority of the court issued a decision favorable to an employer from which you dissented.**

I do not recall a case during my tenure where the majority ruled against an injured employee (except the plurality opinion in *Byrnes v. LCI*) and thus I have lacked occasion to offer dissents in favor of employees. I did, however, join majority opinions that favored employees including: *Rice v. CertainTeed* (awarding punitive damages in civil employment discrimination action); *Ruckman v. Cubby Drilling* (holding that drilling company workers injured in auto accident on way to drilling site were entitled to workers compensation); and *State ex rel Highfill v. Industrial Commission* (affirming an award for violation of specific safety requirement).

b. **According to this same analysis, in cases involving lawsuits against an employer you dissented twenty-three times to support the employer's position when a majority of your court ruled in favor of the employee. You were the lone dissenter in over half of those cases. A list of these cases is attached as Exhibit A. Are these statistics accurate?**

I do not decide cases on any basis other than legitimate appellate principles of review, irrespective of the types of parties at bar. I have written and joined opinions that "favored" employers, and I have joined opinions that "favored" employees. *See, e.g., Gibson v. Meadow Gold; Conley v. Brown.*

I cannot verify or contest the statistics you cite. I have been unable to confirm the numbers on which your question is based and therefore do not know whether the statistics are accurate.

My approach to deciding cases is an objective effort to determine which side of a dispute is better supported by the relevant body of legal doctrine, not the identity of who wins or loses in the end.

3. **In *Norgard v. Brush Wellman*, your dissent would have enforced a statute of limitations against an employee even though the employer intentionally lied or withheld information preventing the employee from discovering the employer's wrongdoing.**

a. As a judge, what legal rights, if any, do you believe people should have when an employer hides information about the cause of an employee's death or serious physical injury?

In Ohio, until an employee knows that he/she has been injured and its cause, limitation periods do not begin to run. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727, *paragraph two of the syllabus.*

b. When a company, as in the cases of *Norgard* and *Wal-Mart*, engages in intentional misconduct towards their employees and uses the legal system to avoid accountability, what recourse should the employees have?

An employee's recourse is the legal system. Our legal system holds employers accountable for unlawful conduct. Enforcement of statutes of limitations and appropriate accrual dates for application of discovery rules protect individuals and employers alike from stale claims. Likewise, the res judicata doctrine benefits both employees and employers by insuring finality of judgments.

4. **In the case of *Bunger v. Lawson Co.*, a majority of your court ruled that an employee had a cause of action for psychological injury against her employer and that, because psychological injury is not considered an injury according to the Ohio's Worker's Compensation statute, it is not among the class of injuries from which employers are immune from suit. You dissented, which would have left the employee with no remedy at all for her injuries.**

Please explain your reasoning for the "Catch-22" you would have imposed in this case?

In writing the dissent in *Bunger*, I did not choose the law that imposed the "Catch-22". It was the Ohio General Assembly that determined by statutory definitions that an employee could suffer a "bodily condition" that is not compensable as an "injury" yet an employer would also be immune from suit by that employee based on the work-related "bodily condition" suffered. The Ohio statutes at bar in the *Bunger* case explicitly provided employer immunity that was broader than the employee compensability definitions. My dissent expresses no judgment regarding the wisdom of such legislation but simply reflects an honest reading of it.

5. **In your dissent in *Bray v. Russell*, you argued that a statute giving the Ohio Parole Board the broad power to decide criminal cases that arise in prison and to then add time to a prisoner's sentence based on the results of these decisions was constitutional. Though the majority of your court found the**

statute to be unconstitutional, you disagreed arguing that the statute dealt with a disciplinary proceeding, rather than a criminal proceeding.

Based on your dissent in the case, what rights and protections, if any, do you believe a convicted prisoner should have in defending himself from an allegation of criminal misconduct while in prison?

In *Bray v. Russell,* the prisoner challenged the statutory scheme as being violative of the doctrine of separation of powers. That is the sole question upon which I offered an opinion. My dissent applied the appropriate analytical framework for assessing separation-of-powers challenges and concluded that since the "bad time" is imposed as a part of the original sentence, and since the administration of bad time does not interfere with the judicial function, it does not offend the separation-of-powers doctrine of the Ohio or United States Constitution. My dissenting view was joined by Justice Douglas and comports with United States Supreme Court precedent.

If I were presented with a case where a prisoner claimed that the prison-imposed rules violated her constitutional rights, I would evaluate that claim according to the appropriate precedent for deciding such claims.

6. **In your dissent in *Williams v. Aetna Finance Co.*, you state: "[T]he majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors, however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.**

   a. **Do you believe that the interest in arbitration is so compelling that it should override the interest of consumers who have entered into agreements that they might not have made had they known the legal ramifications of their actions?**

I joined the majority in deciding that Mrs. Williams had established her claim of a civil conspiracy and that her verdict, including $1.5M in punitive damages, should stand. I opined in partial dissent that the majority's decision that the contract between Mrs. Williams and ITT was unenforceable lacked analysis under the two prongs of procedural and substantive unconsionability.

b. Are there any circumstances under which you would find a contract provision unenforceable based on principles of equity notwithstanding a general legislative policy supporting such a contract?

Yes. Though state and federal legislation favors enforcement of agreements to arbitrate, both R.C. 2711.01(A) and Section 2, Title 9, U.S.Code permit a court to invalidate an arbitration agreement on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability.

7. **In the case of *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union Local 627*, the majority upheld an arbitrator's interpretation of a Union's Collective Bargaining Agreement to reinstate a union employee after he was automatically discharged under the agreement's drug policy because the automatic discharge was in conflict with other portions of the agreement.**

In your lone dissent you acknowledge that the Supreme Court, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, stated that arbitrators may certainly interpret Collective Bargaining Agreement provisions, yet you state that the arbitrator's interpretation of the agreement should not be upheld.

a. **Do you disagree with the authority of the Supreme Court that it is the responsibility of an arbitration panel to interpret a Collective Bargaining Agreement if they are given the authority to do so under the agreement?**

No. The exception to this general rule, however, is that any interpretation must draw its essence from the bargaining agreement itself.

b. **If it is not the province of the arbitration panel to decide these issues, then who should decide the meaning of a Collective Bargaining Agreement?**

A court is obliged to correct a decision of an arbitration panel that does not draw its essence from the collective bargaining agreement. As I wrote in dissent, quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Internatl. Union* (C.A.4, 1996), 76 F.3d 606, 610, the arbitration panel here "ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that appealed to [its] own notions of right and wrong. * * * By fashioning [a] new remedy and infusing [its] personal feelings and sense of fairness into the award, the [panel] created an award that failed to draw its essence from the CBA." *Id.*, 76 F.3d at 610. As the United States Supreme Court noted in *United Steelworkers of America*, though

arbitrators may certainly interpret CBA provisions, they cannot disregard them, and "[do] not sit to dispense [their] own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.* (1960), 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, 1428.

c. Why was the Ohio legislative policy in favor of arbitration powerful enough to override the equities in the *Williams* case, yet not strong enough to prevent you from interfering with the arbitrator's decision when it came out in favor of the union employee in the *Southwest Ohio* case?

The dissenting views in both cases emanate from the principle of sanctity of contract supporting the upholding of contractual arrangements unless another overriding principle prevents enforcement of the contract terms. I therefore believe that the dissents in these two cases are consistent.